UNITED
NATIONS

AT

Administrative Tribunal

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25 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 592

Case No. 657: SUE-TING-LEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Barbara Sue-Ting-Len, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1991, and 29 February 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 February 1992, the Applicant filed an application requesting the Tribunal to find:

> "(1) that Applicant was fully qualified to be recommended by her Department for post No. UNA-27775-E-P3-003 within the framework of the Internal Vacancy Announcement, and that such a recommendation should now be made without further delay (...);
>
> (2) that Applicant be paid a Special Post Allowance to the P-3 level also in case her candidacy is successful, until such time when she is promoted against that post (...); and
>
> (3) that Applicant be awarded appropriate compensation for the injury and delays she has suffered as a result of the Administration's repeated violation of her right to fair treatment (...)."

Whereas the Respondent filed his answer on 1 August 1992;

Whereas the Applicant filed written observations on 30 November 1992;

Whereas, on 3 June 1993, the Applicant submitted additional documents;

Whereas, on 10 June and 21 June 1993, the Tribunal put questions to the Respondent, who on 17 June and 21 June 1993, provided answers thereon;

Whereas, on 20 June 1993, the Applicant submitted her comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1968, as a Clerk-Typist at the G-2 level, for the duration of the twenty-third session of the General Assembly. She was assigned to the Press Pool, Press and Publications Division, Department of Public Information (DPI). On the expiration of her appointment, she was offered another three-month fixed-term appointment, which was converted to a probationary appointment, with effect from 24 March 1969. On 1 April 1969, she was promoted to the G-3 level and on 1 October 1970, she was granted a permanent appointment. On 1 April 1973, she was promoted to the G-4 level and on 1 February 1979, to the G-5 level, as a Research Assistant. In March 1981, she was assigned to the Radio and Visual Services Division (RVSD) Department of Public Information. As a result of the implementation of the classification of posts in the General Service and Related Categories in New York, she was promoted to the P-2 level, as an Associate Information Officer, with effect from 1 January 1986. On 2 October 1987, she was reassigned within RVSD to the Promotion and Distribution Unit, DPI.

On 12 August 1988, the Applicant assumed the functions of a P-3 post in that unit, replacing the incumbent, who had been reassigned. At the Applicant's request and with the Executive Office's concurrence, she was granted a Special Post Allowance (SPA) to the P-3 level, with effect from 12 March 1989.

Upon the P-3 post she had occupied becoming vacant, an Internal Vacancy Announcement to advertise her P-3 post of Information Officer was issued, the deadline for applications being 6 August 1990. The Applicant, who had submitted an application for this vacancy, was informed on 15 October 1990, that she had not been selected for the position and that no other internal candidates had been selected. On 25 October 1990, the Applicant's SPA was discontinued, and she was re-assigned to her former P-2 post.

On 2 November 1990, the Applicant requested the Secretary-General to review the administrative decision not to select her for the P-3 position.

An external Vacancy Announcement was issued for the post for which the Applicant had applied, with a deadline of 10 December 1990.

On 20 December 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in which she requested, under staff rule 111.2(f), suspension of the external vacancy announcement. On 31 January 1991, the JAB recommended unanimously that the Secretary-General suspend action on the filling of the post.

On 6 February 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's report and had "decided, taking into account the entire circumstances of the case, that action on the filling of the post ... be suspended for twenty-one days to enable the Board to consider, during that period, the substance of your appeal".

The Board adopted its report on the merits of the case on 19 March 1991. Its recommendation reads as follows:

Recommendation

16. The majority of the Panel recommends that:

(a) The Appointment and Promotion body convened to consider candidates for post No. UNA-27775-E-P3-003 (Vacancy Announcement No. 90-I-DPI-19-NY)

should receive detailed analyses of the qualifications of the internal candidates short-listed as a result of internal vacancy announcement No. 90-I-DPI-347-NY; these analyses should be prepared on the same basis, and in a comparable format, as those for external candidates and should cover, but not be restricted to, marketing qualifications;

(b) The Appointment and Promotions body should be given all information necessary to enable it to give fair and full consideration to Appellant and all other internal and external candidates; it should, therefore, receive a copy of this Report;

(c) A PER [Performance Evaluation Report] should be prepared forthwith for the period Appellant performed the functions of the post in question, and that PER should be part of the submission to the Appointment and Promotion body reviewing candidates for the post;

(d) Without wishing to prejudice the results of the review, should Appellant not be chosen for the post, she should be paid an SPA to the P-3 level from October 1990, until she was transferred to another assignment."

In a dissenting opinion, a member of the Panel stated in part:

"... I find that the majority of the Panel failed to properly investigate DPI's allegations that Appellant did not 'fully' meet all the requirements of the contested post."

and

"... I would recommend that all of Appellant's pleas be sustained."

On 25 March 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and stated:

"The Secretary-General has re-examined your case in the light of the Board's report including the dissenting opinion. He has decided to accept the recommendation of the majority of the Board contained in ... the report that:

(a) the Appointment and Promotion body convened to consider candidates for post No. UNA-27775-E-P3-003 (vacancy announcement No. 90-I-DPI-19-NY) should receive detailed analyses of the qualifications of the internal candidates short-listed as a result of internal vacancy announcement No. 90-I-DPI-347-NY; these analyses should be prepared on the same basis, and in a comparable format, as those for external candidates and should cover, but not be restricted to, marketing qualifications;

(b) the Appointment and Promotion body should be given all information necessary to enable it to give fair and full consideration to Appellant and all other internal and external candidates; it should, therefore, receive a copy of the Board's Report;

(c) a PER should be prepared forthwith for the period Appellant performed the functions of the post in question, and that PER should be part of the submission to the Appointment and Promotion body reviewing candidate for the post; and

(d) should you not be selected for the post, that you be paid Special Post Allowance from October 1990 to the date of your assignment to another post."

On 29 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in dismissing her appeal as it did not consider the absence of her performance evaluation reports when making its recommendations but relied instead on the evaluation statement made by the Department. On the basis of her two performance evaluation reports which were subsequently prepared, she should have been recommended for promotion by her Department.

2. Because she is a staff member, the Applicant is entitled to have her candidacy evaluated against other staff members only. Consideration of her candidacy together with external candidates amounts to violation of her rights.

3. After the discontinuation of the SPA in October 1990, the Applicant has continued to perform the same functions. She is, therefore, entitled to be paid an SPA for this period whether or not she is eventually promoted.

Whereas the Respondent's principal contentions are:

1. The evaluation of staff for promotion is a discretionary act of the Secretary-General which can only be challenged if such evaluation is tainted with prejudice or discrimination or improper motive. The Applicant has been given full and fair consideration for promotion and has failed to establish any improper motivation.

2. The Applicant did not meet the requirements set forth in staff rule 103.11(b) and is not entitled to an SPA, since 25 October 1990.

The Tribunal, having deliberated from 10 June to 25 June 1993, now pronounces the following judgement:

I. The Applicant asserts that the Joint Appeals Board (JAB) erred inasmuch as, in discussing her appeal, it did not consider the absence of her performance evaluation reports when making its recommendations, but relied instead on the statement dated 18 December 1990, by the Under-Secretary-General for the Department of Public Information (DPI) to the Chief, Administrative Review Unit. The Applicant also argues that on the basis of her two performance evaluation reports, which were subsequently prepared, she should have been recommended for promotion to the P-3 level by her department. She further contends that, as a staff member, she is entitled to have her candidacy assessed against other staff members only and that consideration of her candidacy, together with external candidates, amounts to violation of her rights.

II. The Applicant argues that after the discontinuation of the Special Post Allowance (SPA) on 25 October 1990, she continued to perform the same functions and was, therefore, entitled to be paid an SPA to the P-3 level, from that date until she was assigned to another post. She also requests appropriate compensation for the injury and delays she has suffered.

III. The main issue for the Tribunal is to determine the validity of the decision not to recommend the Applicant for a P-3 post, the functions of which she had performed since 12 August 1988 and for which she was granted an SPA to the P-3 level, with effect from 12 March 1989.

IV. In accordance with the Tribunal's jurisprudence, a staff member has no automatic right to promotion. (Cf. Judgement No. 134, Fürst (1969), para. III). The Tribunal has also held that promotions are at the discretion of the Secretary-General and that, as a consequence, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and cannot be considered by staff members as giving rise to any expectancy of promotion. (Cf. Judgement No. 312, Roberts (1987), para. II and Judgement No. 586, Atefat (1992), para. V).

V. At the same time, the Tribunal has consistently held that staff members are entitled to be properly considered for promotion and that failure on the part of the Administration to accord such consideration constitutes a violation of the staff member's rights and may call for compensation. (Cf. Judgement No. 266, Capio (1980)). The Applicant claims that by failing to prepare, in a timely fashion, her two performance evaluation reports, the Administration deprived her of her right to be properly considered for promotion.

VI. The Tribunal notes that upon appointment of the former incumbent to another post, an undated internal vacancy announcement

was issued with a deadline of 6 August 1990. The Applicant, who submitted her application for that vacancy, was not selected. Nor was any other internal candidate selected. An undated external vacancy announcement for the same post was subsequently issued, with a deadline for applications of 10 December 1990.

VII. The Tribunal further notes that, at the request of the Applicant and on the recommendation of the JAB, the Secretary-General decided on 6 February 1991, to suspend action for 21 days on the filling of the post, to enable the JAB to consider, during that period, the substance of the appeal lodged by the Applicant in which, inter alia, she requested suspension of the external vacancy announcement.

VIII. The Tribunal observes that neither the Appointment and Promotion Board nor the JAB had before them the two performance evaluation reports on the Applicant for the periods 16 April 1987 to 7 August 1989 and again, from 8 August 1989 to 31 March 1991. According to the Applicant's file, it was only in mid-June 1991, that the Applicant received and signed the two performance evaluation reports in question.

The Tribunal must take into account the Administration's failure to provide the appropriate bodies, in a timely fashion, with complete and accurate information on the Applicant's performance. As stated in Judgement No. 331, Large (1984), para. VI, "the Tribunal has held that all efforts must be made to have these [performance evaluation] reports prepared on time and in proper form...". In the present case, the two performance evaluation reports were completed three months after the JAB submitted its report. The JAB based its recommendations on a statement made on 18 December 1990, by the Under-Secretary-General, DPI, to the Chief, Administrative Review Unit, during the JAB proceedings. This statement could not replace the contents of a performance evaluation report.

IX. The Tribunal took note of the Respondent's contention that an updated performance evaluation report is not relevant in relation "to the determination of whether or not Applicant was fully qualified for the post" (emphasis in the original). The Tribunal does not accept this view and recalls that, in accordance with its jurisprudence, "it is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion". (Cf. Judgement No. 608, Atefat (1992), para. IX).

X. The Tribunal emphasizes that the Administration was not obliged to promote the Applicant. The Tribunal considers, in keeping with its jurisprudence, that the Applicant was entitled to fair and adequate consideration for promotion. Explaining the reasons for rejecting the application, the Under-Secretary-General, DPI, stated on 18 December 1990, that the Applicant "did not meet fully the required experience in marketing ..." and that "the function she performed, though satisfactorily, did not include the marketing functions ... as reflected in the classified job description for the post in question."

XI. The Tribunal observes that, the two performance evaluation reports contain an express disavowal of the above statement: the performance evaluation reports confirm the Applicant's experience in marketing. On the basis of the report of the Rebuttal Panel constituted to consider the Applicant's rebuttal to her second performance evaluation report, the Under-Secretary-General, DPI, recommended on 7 January 1992, the deletion of the comments by the Second Reporting Officer about the Applicant's alleged lack of experience in the "promotional part of her work". In the view of the Tribunal, this is a clear acknowledgement that the information contained in the statement dated 18 December 1990, was not accurate. The Tribunal concludes that the decision not to promote the Applicant to the P-3 post was thus made on the basis of incomplete and inaccurate information. The Applicant's right to fair and full consideration for promotion was not adequately respected and, consequently, the responsibility of the Administration is engaged.

XII. The Tribunal will not speculate on what the outcome of the Applicant's request for promotion might have been if the two performance evaluation reports containing the overall rating of a "very good performance" had been submitted on time. The Tribunal holds that their non-submission in time constitutes an omission, which violates paragraphs 4 and 5 of administrative instruction ST/AI/240/Rev.2.

XIII. The Applicant asserts that while she had received an SPA to the P-3 level, from 12 March 1989 to 25 October 1990, she continued to perform the same functions for 16 months thereafter. The Tribunal notes that on 19 March 1991, the JAB recommended, and on 25 March 1991, the Secretary-General agreed, that should the Applicant not be chosen for the P-3 post, she should be paid an SPA to the P-3 level from October 1990, until she was reassigned.

XIV. The Tribunal notes that the Respondent, in his answer, states that, for purposes of an SPA, a staff member is regarded as having assumed the full duties and responsibilities of a higher-level post only if he or she is assigned to that post on the official manning table. The Respondent further states, that upon the discontinuation of her SPA in October 1990, the Applicant was placed against a P-2 post and she was no longer required to perform the functions of the P-3 post. The Respondent therefore asserts that the Applicant is not entitled to an SPA after 25 October 1990, irrespective of whether or not she was selected for the P-3 post in question. The Tribunal, however, has not found that with the discontinuance of the SPA, the functions of the Applicant reverted to those of the P-2 level.

XV. The Tribunal notes that despite the acceptance by the Secretary-General, on 25 March 1991, of the recommendation of the JAB, the Respondent, in his answer dated 11 August 1992, claims that it was in fact "impossible" to give effect to the decision of the Secretary-General.

XVI. In the light of the above facts and considerations, the Tribunal finds no valid reasons why the initial commitment undertaken on behalf of the Secretary-General should not be fulfilled. The Tribunal considers that once the decision to grant the Applicant an SPA, which is discretionary, has been properly taken, such decision must be implemented. Inasmuch as this commitment has not been kept, the Tribunal considers that the Applicant is entitled to suitable compensation, which the Tribunal assesses at $10,000.

XVII. The Tribunal trusts, in addition, that, as compensation for the injury sustained by the Applicant, she will receive priority consideration for promotion, at the earliest possible date, to a vacant P-3 post for which she is qualified.

XVIII. In the light of the foregoing, the Tribunal orders the Respondent to pay to the Applicant the amount of $10,000.

All other claims are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Francis SPAIN
Member

Geneva, 25 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary